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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERIC BRUCE WESTON, Defendant and Appellant.	E033065 (Super.Ct.No. RIF 90871) O P I N I O N

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed with directions.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Douglas C. S. Lee, Deputy Attorney General, for Plaintiff and Respondent.

1. INTRODUCTION

Defendant was charged in a one-count information of attempting to commit a lewd and lascivious act upon a child under the age of 14 years with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of himself and the child. (Pen. Code, §§ 664 & 288, subd. (a).)[1] He was convicted by a jury and sentenced to three years' probation. The probation was subject to several conditions, including that defendant serve 180 days in county jail and "[n]ot associate with any unrelated person on probation or parole."

Defendant appealed. He contends that: (1) the conviction should be reversed because there is no substantial evidence to support the verdict; and (2) the probation condition that he not associate with persons on probation or parole is unconstitutionally overbroad and vague. We find that substantial evidence supports the verdict. Further, we remand to the trial court to modify probation condition No. 16 to read, "Not to associate with any unrelated person *known* by defendant to be on probation or parole."

2. FACTS AND PROCEDURAL HISTORY

Dean Spivacke (Spivacke), a Riverside County Sheriff's Department detective trained to investigate child abuse crimes, used the Internet to search for people talking about having sexual relationships with children. On February 15, 2000, Spivacke accessed an Internet Relay Chat room with the title "Little Girls Sex Chat." Spivacke used the screen name "Sheila13." Defendant, a resident of Denver, Colorado, who used

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

the screen name "Whozit," initiated a chat with Sheila13. Because of the number "13" after the name "Sheila," defendant assumed Sheila13 was 13 years old. During the chat, Whozit asked, "have you had sex, sweetie . . .," "have you had intercourse . . .," and "have you had oral . . . ." Whozit told Sheila13 that he was "attracted to young girls," and asked Sheila13 if she would like to "learn to give a blow job" and "learn what it feels like to have a man's cock inside [her]."

Whozit asked if he could call Sheila13. Sheila13 initially refused because Spivacke could not talk like a 13-year-old girl. Sheila13 asked Whozit if she could call him. Whozit said he was hesitant to have her call him because, Whozit stated, "I'm the one who could get in the most trouble" and "I can't take the risk." When Sheila13 asked "what risk?" Whozit responded, "you're too young for me to be talking to that way." Whozit then asked Sheila13 if she was 13, and Sheila13 responded by saying, "yeah. What's wrong with that." Whozit stated that he was "not supposed to have sex with someone so young." Whozit expressed concern that the long-distance call to him in Colorado would be reflected on Sheila13's parent's telephone bill. Sheila13 agreed to call him collect. Whozit then supplied Sheila13 with his telephone number and told her his name was "John."

Spivacke located a Community Services Officer, Heidi Neff (Neff), to act as a "voice decoy" to call defendant. Neff was 22 years old at the time. Neff attempted to call defendant's telephone number collect, but was unsuccessful because defendant's

collect calls were "blocked." She then called him direct. Neff identified herself as "Sheila." Defendant stated, "[y]ou sound old for your age." Neff testified at trial that she did not try to make her voice sound younger. Whozit asked how she would explain the call to her parents and Neff responded that she did not know. Neff stated that she (Sheila) was in the seventh grade and did not have any siblings. Defendant asked her to send him a picture of herself, and Neff agreed. The two then discussed plans to meet in California.

Following the telephone call, Spivacke sent defendant, by e-mail, a photograph of Neff when she was 12 or 13 years old. During the following two weeks, Whozit and Sheila13 engaged in several additional chat sessions. Whozit described what he would do when they met. He told Sheila13 he wanted to "touch [her] all over," "lick and suck [her] nipples," "reach between [her] legs," and "kiss [her] between [her] legs." He asked Sheila13 if she had "ever taken a man's cock in [her] mouth" and whether she "would . . . like to suck on [him]." "[A]t some point," Whozit told Sheila13, "I hope to enter you . . . to slide my hard cock into your sweet little pussy." Whozit asked if he could take pictures of Sheila13 "unclothed."

During a February 29, 2000, chat session, Whozit asked for another photograph of Sheila13. Spivacke sent another photograph of Neff taken at her eighth grade graduation (which Sheila13 told him was taken at her sixth grade graduation). Whozit said that if he were allowed to call her, he would buy tickets to fly out to California. Sheila13 agreed

and gave Whozit the telephone number of a "cold phone" at the police station, which, if traced, would not reveal that it was a police telephone line.

Spivacke then arranged for Lina Gama (Gama), another female Community Services Officer, to act as the voice decoy. Gama was 21 years old at the time. Defendant called and spoke with Gama. They discussed meeting "around the 18th" and defendant said, "we can go for a drive," and asked Sheila13 if she wanted "to go back to [his] hotel room." Defendant asked if Sheila13 was "excited" about "meeting an . . . old man" and Gama replied, "yes, 'cause it gives me experience." Defendant asked, "Experience . . . at what?" to which Gama replied, "[a]t sexual things." Defendant then said, "Well, we'll see what you're comfortable with. Won't do anything more than that okay?" Defendant told Sheila13 she should not tell her friends about meeting him because friends could tell their parents, who would tell her parents.

Defendant and Sheila13 engaged in additional chat room conversations over the next few weeks in which he discussed various sexual acts he would do with Sheila13 when they met. The two arranged to meet at the Moreno Valley Mall in front of the Wet Seal store at 1:00 p.m. Defendant said he would bring shoes, stockings, lingerie, spermicide, and condoms. On March 16, 2000, Whozit and Sheila13 chatted on the Internet for the last time. Defendant, who was 30 years old at the time, said, "you realize I'm twice yer [*sic*] age." They agreed that defendant would call Sheila13's (Spivacke's) pager and type "69" to indicate that the meeting at the mall was still on. If defendant

wanted Sheila13 to call him, he would also indicate a telephone number. The two also agreed that they would each wear purple shirts when they met in the mall.

Defendant flew from Denver, Colorado, to Ontario, California, on Friday, March 17, 2000, and rented a car and hotel room. On March 18, 2000, at approximately 12:00 p.m., Spivacke received a page with the number "69" and a telephone number. Spivacke traced the telephone number to a pay telephone in the City of Moreno Valley. Spivacke called the telephone number, but there was no answer. He then received another page with the number "69" only, indicating the meeting was on. Spivacke arranged for Donna Schlotter (Schlotter), another Community Services Officer, to act as Sheila13 at the mall. Schlotter was 33 years old at the time. She was five feet two inches tall and weighed approximately 110 pounds. Spivacke selected Schlotter because she had the physical appearance of the person described by Sheila13 in the chats. She dressed in the agreed-upon purple shirt and her daughter's overalls, had her daughter's backpack with her, and wore a wide brimmed hat "to disguise her more to appear as though she were a 13 year old." Schlotter was instructed to sit on a bench in front of the Wet Seal store and wait for defendant to appear. Spivacke and other police officers waited nearby in the mall.

Spivacke observed defendant standing on a landing above the Wet Seal store looking down at Schlotter. Defendant was wearing a white shirt. He watched Schlotter for about five or ten minutes, left for a short time, then reappeared wearing a purple shirt. Defendant approached Schlotter, sat down next to her, and introduced himself. Schlotter

introduced herself and apologized for being late. Defendant said that he was there earlier and had been watching her. This exchange between defendant and Schlotter lasted about 15 seconds. Spivacke then arrested defendant.

Following the arrest, police searched defendant's car and hotel room. In the car, the police found a "Daytimer" notebook, which included a "Personal Information Sheet" indicating Sheila Cartman's name, height, weight, skirt size, panty size, bra size, the telephone number Gama used to call defendant, and a pager number. Next to the telephone number was a footnote stating that the telephone number was registered to Ki J. Lim at 14105 Avenida Luna, Riverside, California. In the hotel room, the police found high heel shoes, a nightgown, panties, nylons, condoms, spermicide, sterile pads, a Polaroid camera, film, and a sign or certificate that read: "MY FIRST TIME, March 18, 2000, DADDY'S LIL GIRL'S NOT A VIRGIN ANYMORE." Defendant purchased the shoes, lingerie, panties, and stockings for Sheila13.

Defendant agreed to be interviewed by Spivacke and another officer. A videotape of the interview was played before the jury. During the interview, defendant told the officers he was Whozit, that meeting a 13 year old was a fantasy, and that he wanted to do something "outside the norm." He said he assumed Sheila13 was 13 years old, but that "it . . . could have been anybody." He told the officers he did not know what his intent was when he flew out from Colorado and that he did not know whether he "would've gone through" with it. He said he did not know whether he would talk to

Sheila13 until he saw her at the mall. At that point, he said, he decided to approach her and changed into the agreed-upon purple shirt.

At trial, defendant testified that although he initially assumed Sheila13 was 13 years old, he came to believe that she was an adult who had a fantasy of being a child. In support of his "fantasy" defense,[2] defendant relied primarily upon the following evidence. During their chat sessions and telephone calls, Sheila13 told defendant her last name was "Cartman," which was the name of a cartoon character on the animated television show "South Park." She had an older-sounding voice and was willing to make a direct toll call that would be revealed on the telephone bill. Sheila13 told Whozit she lived on Andretti Street in Moreno Valley and that her father was a dentist. Prior to coming to California, defendant learned that there was no family named "Cartman" on Andretti Street. Defendant also used the Internet to search for dentists in the Riverside area with the last name "Cartman" and found none. By using a "reverse directory," defendant learned that the telephone number he called to speak with Sheila13 (Gama) was registered to Ki J. Lim at 14105 Avenida Luna, Riverside, California. During one chat, Sheila13 told Whozit that she had a sister, which contradicted Neff's earlier statement that she had no siblings. These facts, defendant testified, led him to believe

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[2] "The [fantasy] defense is based on the argument that people using the Internet do not always believe the identities of those with whom they are communicating. The disbelief is premised on the idea that the Internet and the anonymity it allows encourage people to change their identities or role-play in order to socialize on the Internet. This role-playing makes it difficult to distinguish between fantasy and when the person is breaking the law by acting upon this fantasy." (Comment, *Prosecuting Cyber-*

that Sheila13 was not a 13-year-old girl. On March 11, 2000, one week prior to their meeting, defendant noticed that Sheila13 had accessed the Internet by using a different telephone number and Internet Service Provider. Defendant thus concluded that Sheila13 was an adult who usually chatted with him from work but, on this occasion, used her home computer to chat. Finally, defendant said that when he arrived at the mall, he saw Schlotter and estimated her age to be "[a]t least mid-20[']s." Only then, he testified, did he decide to meet her.

3. DISCUSSION

A. *Substantial Evidence Supports the Verdict*

Defendant contends that there is no substantial evidence to support the verdict. We disagree. "'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Bolden* (2002) 29 Cal.4th 515, 553, cert. den. (2003) ___ U.S. ___, quoting *People v. Kipp* (2001) 26 Cal.4th 1100, 1128, cert. den. (2002) 537 U.S. 846.)

Defendant was charged with attempting to violate section 288, subdivision (a). "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts . . . ." (§ 664.) Section 288, subdivision (a), provides, in

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pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy

part, that "[a]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." (§ 288, subd. (a).) The lewd and lascivious act may be any touching of the victim with the requisite specific intent. (*People v. Martinez* (1995) 11 Cal.4th 434, 444; *People v. Scott* (1994) 9 Cal.4th 331, 342-343.)

"An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) "The intent to commit a violation of . . . section 288 is 'the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires' of the perpetrator or of the victim." (*People v. Imler* (1992) 9 Cal.App.4th 1178, 1181.) Specific intent is rarely susceptible to direct proof and may, and usually must be, inferred from circumstantial evidence. (*People v. Cole* (1985) 165 Cal.App.3d 41, 48.) Whether a defendant has the requisite specific intent is a question of fact which may be inferred by the jury from all the circumstances surrounding the defendant's action. (*Ibid.*)

There is ample evidence in the present matter from which the trier of fact could have concluded that the defendant believed that Sheila13 was under the age of 14. Defendant met Sheila13 in "Little Girls Sex Chat." Sheila13 told him she was 13 years old. During the chats and telephone conversations, the two frequently discussed

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Defense? (2001) 41 Santa Clara L.Rev. 547, 565.)

Sheila13's parents and her seventh grade school activities. Defendant expressed concern about being caught with a 13 year old. When Sheila13 asked if there was something wrong with her being 13, defendant stated that he was not supposed to have sex with someone so young. Defendant warned her about discussing their encounter with her friends because they might tell their parents, who would tell Sheila13's parents. Although defendant testified that he had previously concluded Sheila13 was an adult based upon statements made during their chats, as late as their last chat session before flying to California he stated that he was twice Sheila13's age.

It is additionally clear that defendant wished to engage in physical conduct with Sheila13 so as to gratify his or her sexual desires. This is evidenced by the content of the various Internet chats, defendant's statement to Spivacke that he wanted to do something "outside the norm," and the various sundries that were found in his hotel room.

Defendant contends on appeal that he "had good reason to believe she was an adult carrying out a school girl sex fantasy." Defendant points to evidence that Sheila13 sounded "older" on the telephone, had lied about her name, address, and other personal information, used a different Internet Service Provider, and was willing to make a direct (rather than collect) call to him. It was not until he saw her at the mall and decided she was an adult, he contends, that he approached Sheila13. The evidence, he argues, supports the inference that Sheila13 was "a grown woman playing the role of a school girl on the [I]nternet."

Although there was evidence to support defendant's "fantasy" defense at trial, our role is limited to determining whether there exists in the record substantial evidence to support the verdict. "The trier of fact, not the appellate court, must be convinced of the defendant's guilt, and if the circumstances and reasonable inferences justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment." (*In re Randy S.* (1999) 76 Cal.App.4th 400, 404.) Thus, regardless of whether evidence exists to support defendant's argument that he had good reason to believe Sheila13 was an adult, the record supports the jury's conclusion that defendant thought Sheila13 was under 14 years of age.

To constitute an attempt, the defendant must, in addition to having the requisite intent, make a direct overt, but ineffectual, act done toward its commission. (*People v. Memro* (1985) 38 Cal.3d 658, 698 (*Memro*).) The overt act need not be the last proximate or ultimate step toward the commission of the crime. (*People v. Dillon* (1983) 34 Cal.3d 441, 453 (*Dillon*); *People v. Herman* (2002) 97 Cal.App.4th 1369, 1389 (*Herman*).) "'[I]t is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.'" (*Memro, supra,* at p. 698, quoting *People v. Fulton* (1961) 188 Cal.App.2d 105, 116.) "No bright line distinguishes mere preparatory acts from commencement of the criminal design." (*Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187 (*Hatch*).) "*As long as the trier of fact is convinced beyond a*

reasonable doubt that the defendant intended to commit a crime and was in the process of attempting to carry out that intent, no public purpose is served by drawing fine distinctions between those who have managed to satisfy some element of the offense and those who have not." (*Dillon, supra,* at p. 453, italics added.) The clearer the evidence of criminal intent, the less proximate the acts in furtherance of the intent must be in order to satisfy the overt act element. (*Memro, supra,* at p. 698; *Hatch v. Superior Court, supra,* at pp. 187-188.)

In *People* v. *Reed* (1996) 53 Cal.App.4th 389 (*Reed*), the defendant corresponded with an undercover detective who had been posing as a mother of two children under 14 years of age. The defendant described sexual activity he intended to engage in with the girls. The two agreed to meet at a motel where the defendant brought with him various sex toys and lubricating jelly. At the motel, the officer asked the defendant if he was prepared to meet the girls, and the defendant said that "he would not be there if he was not ready." (*Id.* at p. 395.) The officer then led the defendant into the adjoining room where he was arrested for attempting to violate section 288, subdivision (a). (*Reed, supra,* at pp. 393, 395.) In upholding the conviction, the court stated, "It is obviously impossible to be certain that a person will not lose his resolve to commit the crime until he completes the last act necessary for its accomplishment. But the law of attempts would be largely without function if it could not be invoked until the trigger was pulled, the blow struck, or the money seized. If it is not clear from a suspect's acts what he

intends to do, an observer cannot reasonably conclude that a crime will be committed; but when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway . . . ." (*Id.* at p. 398, quoting *Dillon*, *supra*, 34 Cal.3d at p. 455.)

Here, the jury could have reasonably concluded that defendant went beyond mere preparation in furtherance of his intent, and that, absent an intervening force, the crime was about to be consummated. (See *Reed, supra,* 53 Cal.App.4th at p. 398.) During their Internet chats, defendant frequently discussed the sexual activity he planned to engage in with Sheila13 when they met. Implementing his plan, he bought shoes, panties, lingerie, condoms, and spermicide for their meeting and made the certificate referring to Sheila13's loss of virginity on the date they had agreed to meet. He purchased an airline ticket and flew from Colorado to California. After renting a hotel room, he sent a pager message to Sheila13 with the number "69," signifying their meeting was on. After arriving at the mall, he changed into the agreed-upon purple shirt and approached someone the jury could reasonably conclude defendant believed was 13 years old. By this point, defendant had unequivocally confirmed his criminal intentions. These acts, a jury could have reasonably concluded, constituted, at least, the "actual commencement of his plan" (*Memro*, *supra*, 38 Cal.3d at p. 699), and that the attempt was underway (*Reed, supra,* at p. 398; *Dillon, supra,* 34 Cal.3d at p. 455).

Defendant argues that he arranged to meet Sheila13 in a public place, not, as in

Reed, at a motel room "where he could immediately have sex." The issue, however, is not the distance between the meeting place and the intended illegal conduct, but whether, from all the circumstances surrounding the perpetrator's actions, he has moved beyond mere preparation and undertaken acts which are unequivocally and proximately connected to the crime. (*Reed*, *supra,* 53 Cal.App.4th at p. 398; *Dillon*, *supra*, 34 Cal.3d at p. 455.) Although the trier of fact may consider the distance between a meeting place and the location for the intended crime in determining whether a defendant's actions are proximately connected to the crime, we cannot conclude that, in view of all the other actions defendant took in furtherance of his intent, the jury was unreasonable in finding that the meeting at the mall was not so connected. (See *Herman, supra,* 97 Cal.App.4th at pp. 1390-1392 [conviction for attempt affirmed where defendant asked underage children to get into his car and drive to another location to engage in lewd and lascivious conduct].)

Were we to conclude that further action by defendant was required before an attempt occurred, we would require of the police that they stand by and watch as someone with a clear intent to engage in lewd and lascivious conduct with an underage child gets into a car with the child to drive to a hotel room before arresting him. The law of attempt does not require such restraint. "Applying criminal culpability to acts directly moving toward commission of crime . . . is an obvious safeguard to society because it makes it *unnecessary for police to wait before intervening until the actor has done the*

substantive evil sought to be prevented. It allows such criminal conduct to be stopped or intercepted *when it becomes clear what the actor's intention is and when the acts done show that the perpetrator is actually putting his plan into action*." (*Herman*, *supra*, 97 Cal.App.4th at p. 1389, quoting *Dillon, supra,* 34 Cal.3d at p. 453; see also *Dillon, supra,* at p. 454 ["Public safety would be needlessly jeopardized if the police were required to refrain from interceding until absolutely certain in each case that the criminal would go through with his plan"].) By the time defendant changed from his white shirt to his purple shirt and began to approach Sheila13, defendant's immediate intent became patent and it was more than mere preparation. By this point, the elements of attempt had been met and the police need not have waited until further action was taken before intervening.

B. *Probation Condition No. 16 Should be Narrowed to Include a Knowledge Requirement*

The trial court imposed a condition on defendant's probation that he not associate with any unrelated persons on probation or parole. Defendant contends that this condition is unconstitutionally overbroad and vague because it is not limited to people whom defendant *knows* are on probation or parole. He requests that this court modify the probation condition to provide that he not associate with any unrelated person he *knows* is on probation or parole. The People do not oppose the request.

A similar probation condition was addressed in *People v. Garcia* (1993) 19 Cal.App.4th 97 (*Garcia*). In *Garcia*, the defendant pled no contest to a charge of theft of

a handgun. He was sentenced to two years probation that included the condition that he "[n]ot associate with . . . any felons, ex-felons, users or sellers of narcotics." (*Id.* at p. 100.) On appeal, the defendant argued that the condition impinged on his constitutional right of freedom of association and was overbroad. The court agreed, stating that "[t]he condition requiring appellant to refrain from associating with users and sellers of narcotics, felons and ex-felons impinged on appellant's constitutional right of freedom of association." (*Id.* at p. 102, citing U.S. Const., 1st Amend.; Cal. Const., art. I, § 1.) "Where a condition of probation requires a waiver of constitutional rights," the court explained, "the condition must be narrowly drawn. To the extent it is overbroad it is not reasonably related to a compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights." (*Garcia, supra,* at pp. 101-102.) The court modified the probation condition to provide that the defendant was "not to associate with persons he knows to be users or sellers of narcotics, felons or ex-felons." (*Id.* at p.103.)

Like the condition in *Garcia*, the challenged condition in this case impinges on defendant's freedom of association and is not narrowly drawn. The People do not disagree. We may modify the probation condition accordingly. (See *In re Justin S.* (2001) 93 Cal.App.4th 811, 816; *Garcia, supra,* 19 Cal.App.4th at p. 103.)

4. DISPOSITION

Defendant's probation condition No. 16 is modified to read: "Not to associate

with any unrelated person known by defendant to be on probation or parole." In all other respects, the judgment is affirmed.

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/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Ward
J.